FILED
JAN 5 1981

No. 80-529

IN THE

Supreme Court of the United States

October Term, 1980

CALGON CORPORATION,
Petitioner

v.

LAWRENCE E. DAVIS,
Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD N. STONER II
ROBERT E. SHEEDER
REED SMITH SHAW & MCCLAY
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CALGON CORPORATION

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

STATEMENT REQUIRED BY RULE 28.1:

Petitioner, CALGON Corp., is a wholly-owned subsidiary of Merck & Co., Inc. CALGON has no subsidiaries. Merck's other wholly-owned subsidiaries are:

Baltimore Aircoil Co., Inc.
- Baltimore Aircoil (Australia) Pty.Ltd.
- Baltimore Aircoil Interamerican Corp.
- Baltimore Aircoil-Chemviron N.V./S.A.
- BAC-Pritchard Inc.

Calgon Corp.
- Calgon Interamerican Corp.
- Calgon Interamerican C.A.
- Chemviron S.A.
- Chemviron Ltd.
- Proveedores Tecnicos S.A. de C.V.

Chibret Limitada (90%)
Compagnie Chimique Merck Sharp & Dohme, S.A.
Charles E. Frosst & Co. (Middle East) S.A.L.
Frosst Laboratories, Inc.
Hubbard Farms, Inc.
- Hubbard Foods, Inc.
- Hubbard International Sales Corp.
- Hubbard Europa B.V.
- Spafas, Inc.

International Indemnity Ltd.
Kelco Co.
- Monterey Kelp Corp.
- Scotia Marine Products Ltd.

Laboratoires Merck Sharp & Dohme, S.A.
- Laboratoires Chibret, S.A.

Merck & Co., Inc.
Merck Farms, Inc.
Merck Sharp & Dohme (Argentina) S.A.
- Industrialy Commercial

Merck Sharp & Dohme (Australia) Pty. Ltd.
Merck Sharp & Dohme B.V.
Merck Sharp & Dohme (Belgium) S.A.
Merck Sharp & Dohme Canada Limited
Merck Sharp & Dohme de Espana, S.A.E.

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SUPPLEMENT TO REASONS FOR GRANTING THE WRIT

This Court's Recent Decision In Ricks Emphasizes That A Writ Of Certiorari Should Be Granted In This Case

Remarks in each of the three opinions in a recent decision by this Court emphasize the Third Circuit's error in holding that its disposition of this Age Discrimination in Employment Act ("ADEA") case was "controlled" by two footnotes in *Mohasco,* a Title VII case. *Delaware State College v. Ricks,* —— U.S. ——, 242 BNA Daily Lab. Rep. D-1 (Dec. 15, 1980).

In *Ricks,* a Title VII case, each Justice[1] indicated that this Court *has not previously ruled* that a plaintiff who files an untimely state charge and who files no

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1. "[W]e need not decide whether Ricks was entitled to 300 days to file under Title VII [simply because Delaware is a state with its own fair employment practices agency]." Opinion of Justice Powell n. 13. *"Under certain circumstances,* the filing is extended to 300 days." (Emphasis added.) Opinion of Justice Powell n. 7. (Justice Powell's opinion was joined in by Chief Justice Burger and Justices White, Blackmun and Rehnquist.)

"Title VII would allow Ricks 300 days if he had 'initially instituted' proceedings with a local or state agency with authority to grant him relief. 42 U.S.C. § 2000e-5(b); see *Mohasco Corp. v. Silver,* —— U.S. ——, ——. *To benefit from this provision, however, Ricks would arguably have had to make a timely filing with the state agency."* (Emphasis added.) Opinion of Justice Stewart n. 2. (Justice Stewart's opinion was joined in by Justices Brennan and Marshall.)

"Because the employee must file a charge with the EEOC within 180 days after the occurrence, the Court's analysis will necessitate the filing of a charge while the teacher is still employed." Opinion of Justice Stevens n. 2.

charge at all within 180 days after the occurrence of an alleged unlawful employment practice is nevertheless entitled to the extended 300-day period in which to file his federal charge simply because he lives in a deferral state.

Nevertheless, Respondent argued[2] from dictum in *Mohasco Corp. v. Silver,* 447 U.S. ——, 100 S.Ct. 2486 (1980) (decided before *Ricks*), that this Court had made such a holding under Title VII. The Third Circuit extended that "holding" to the ADEA in this case by ruling that the Respondent is entitled to the longer 300-day filing period solely because he lives in Pennsylvania, a dual-law state.[3] The remarks in *Ricks* emphasize that a writ should be granted to review this extended "holding".

One result of the Third Circuit extending its pre-*Ricks* interpretation of Title VII to the ADEA is that a plaintiff's eligibility for the extended federal filing period depends not upon his filing a complaint with the state agency within either the state limitations period or the normal 180-day federal filing period but upon the vagaries of the laws of the state in which he lives.[4]

As we noted in our Petition, the ADEA's legislative history makes it plain that that is not the correct result under the ADEA.

Moreover, the *Ricks* case strongly indicates that that may not even be the correct application of Title VII.

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2. Respondent's Brief In Opposition at 2-3 (first sentence of Argument).

3. Petition at 16a-17a, 18a.

4. Petition at 9-10, 12.

Justices Stewart, Brennan and Marshall stated in *Ricks* that, had the alternative termination of employment date been considered, Ricks might have been eligible for the 300-day federal filing period depending—not upon the state in which he lived—but "on whether his *filing* of a Complaint with the Delaware Department of Labor entitled him to file with the EEOC [within the extended period]."[5] This underscores the Third Circuit's error in emphasizing merely whether a state was a "deferral state", rather than the plaintiff's actions during the normal federal filing period, to determine a plaintiff's entitlement to the extended federal filing period.

Moreover, these Justices noted that, to qualify for the 300-day period, the Title VII plaintiff "arguably" must "make a timely filing with the state agency".[6] This view, if applied to the ADEA, would also result in the reversal of the Third Circuit's judgment in this case.

The *Ricks* remarks highlight another Third Circuit error. The Third Circuit held that its disposition of the questions of whether an ADEA plaintiff seeking to use the extended 300-day federal filing period must file his state charge either timely or within the normal 180-day federal filing period were "controlled" by this Court's statements in *Mohasco*.[7] To the contrary, the statements in *Ricks* emphasize that—even under Title VII—both of those questions are, at the very least, "open".

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5. (Emphasis added.) Opinion of Justice Stewart, text at n. 2.

6. Opinion of Justice Stewart, n. 2.

7. Petition at 18a.

Moreover, the facts of *Mohasco* did not present or require this Court to decide either question. In *Mohasco,* the plaintiff had made a "timely" state filing[8] and had, in any event, failed to "file" his federal charge within the longer period—even assuming it was the applicable one.

Clearly then, this Court was not even required to resolve in *Mohasco* the very questions under Title VII which the Third Circuit first assumed had been answered and then applied to the ADEA. The remarks in the *Ricks* opinions highlight the errors in the Third Circuit's approach and the importance of this Court granting a writ of certiorari in this case.

The Third Circuit made the same type of error in holding[9] that this Court had ruled in *Oscar Mayer*[10] that an ADEA plaintiff in a dual-law state is entitled to 300 days in which to file a federal charge without regard to when he files a state charge.

Actually, in *Oscar Mayer,* this Court merely ruled that an ADEA plaintiff in a dual-law state must file a charge with the state agency as a mandatory prerequisite to maintaining a federal action. The facts of *Oscar Mayer* did not present the question of whether an untimely state filing made after no charge of any type had been filed in the normal 180 day federal filing period

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8. The New York state limitations period is 365 days. N.Y. Executive Law, app. § 465.3 (McKinney, 1980). *Mohasco Corp. v. Silver,* 447 U.S. ——, 100 S.Ct. 2486, 2489 n. 4 (1980).

9. Petition at 15a-16a.

10. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

would revive and extend plaintiff's expired federal time period.

Indeed, in *Oscar Mayer,* the plaintiff had filed his federal ADEA charge within the normal 180 day federal filing period, a fact which the Third Circuit did not acknowledge. The Third Circuit simply failed to recognize that, in *Oscar Mayer,* the federal filing—done within 180 days—was unquestionably timely and that this Court's statements as to the irrelevance of state limitations period were made in the context of such a timely federal filing. No question concerning the 300-day federal filing period arose in *Oscar Mayer.*

Thus, the circumstances presented in this case—where plaintiff filed no state or federal charge in the normal 180-day federal filing period—were not presented to or ruled upon by this Court in *Oscar Mayer.*

The Third Circuit's application of *Oscar Mayer* out of context and contrary to the legislative history of the ADEA emphasizes that this Court should grant a writ of certiorari in this case.

Moreover, this Court's recent decision in *Ricks*—in which the Respondent's (and the Third Circuit's) broad reading of *Mohasco* was questioned by this entire Court—emphasizes that a writ should be granted in this case so that these recurrent questions under the ADEA may be resolved according to the language and legislative history of the ADEA[11] and not on the basis of

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11. *See,* Sheeder, *Procedural Complexity of the Age Discrimination In Employment Act: An Age-Old Problem,* 18 Duq. L. Rev. 241, 256-261 (1980); Note, *The Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act,* 44 U. Chi. L. Rev. 457, 480 (1977); Note, *The Procedural Requirements Of The Age Discrimination In Employment Act of 1967,* 9 Rut.-Cam. L.J. 540, 558-562 (1978).

erroneous interpretations of footnotes in an opinion interpreting another statute.

Respectfully submitted

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RULE 28.1 STATEMENT (CONT.)

Merck Sharp & Dohme (Europe), Inc.
Merck Sharp & Dohme (Greece), Inc.
Merck Sharp & Dohme Limitada
Merck Sharp & Dohme (I.A.) Corp.
Merck Sharp & Dohme Industria Quimica e
Farmaceutica, Ltda.
Merck Sharp & Dohme Industria Quimica e
Veterinareia, Ltd.
Merck Sharp & Dohme (International) Ltd.
Charles E. Frosst & Co.
Charles E. Frosst (Australia) Pty. Ltd.
MSD (Proprietary) Ltd.
Merck Sharp & Dohme A.G.
Merck Sharp & Dohme, S.A.
Merck Sharp & Dohme Quimica de Colombia S.A.
Mershome Properties Ltd.
Merck Sharp & Dohme (Holdings) Ltd.
Merck Sharp & Dohme Ltd.
Thomas Morson & Son, Ltd.
Merck Sharp & Dohme Internatinal, Inc.
MSD (Japan) Co. Ltd.
Merck Sharp & Dohme de Mexico, S.A. de C.V.
Merck Sharp & Dohme Orthopedics Co., Inc.
Merck Sharp & Dohme (Panama) S.A.
Merck Sharp & Dohme (Asia) Ltd.
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Merck Sharp & Dohme de Venezuela C.A.
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